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In The

Supreme Court of the United States

October Term 1997

DAVID EUGENE HALL,

Petitioner,

v.

CHARLES HIPPS,
Jackson County District Attorney,
in his Individual and Official Capacity;
HAROLD MCMAHAN,
Town of Sylva Chief of Police
in his Individual and Official Capacity;
MARLENE HYATT,
Thirtieth Judicial District Superior Court Judge,
in her Individual and Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

1. Whether the petitioner has sufficiently stated a deprivation of a recognized life, liberty, or property interest when, while working as a law enforcement officer, he was held at the beginning and end of a 14-month long criminal court case to have violated state law and to have engaged in various wrongdoings without ever receiving notice, a hearing, or formal charges.

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The opinion of the court of appeals is unpublished and is reproduced in the Appendix to this brief (hereinafter, "App") on App.-1. Hall did not seek rehearing in the Court of Appeals. The opinion of the District Court (App.-6), is also unpublished.

JURISDICTION

The Court of Appeals entered its judgment on July 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)(1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment of the United States Constitution reads in pertinent part:

   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. Section 1983 (1994) reads in pertinent part:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I. Procedural Facts.

Hall brought a claim in the United States District Court, Western District of North Carolina, Asheville Division, on July 18, 1995 and pursuant to 42 U.S.C. Section 1983, alleging that his rights to due process under the Fourteenth Amendment had been violated by all of the defendants. In the District Court, Hall also alleged jurisdiction under 28 U.S.C. 1291 and 28 U.S.C. 1331.

McMahan answered on August 30, 1995, and Jackson County, North Carolina answered on August 31, 1995. Hipps and Hyatt moved to dismiss September 28, 1995. Chief U.S. Magistrate Judge J. Toliver Davis filed a Memorandum and Recommendation on November 1, 1995, in which he advised that Defendants Hipps' and Hyatt's Motion to Dismiss be granted because the Plaintiff had not filed his response to the Motion to Dismiss by the deadline for such, and, in the alternative, that the Petitioner had failed to state a claim under the Fourteenth Amendment.

The Petitioner responded on November 13, 1995 with a Motion for Leave to File a Response Out of Time, an Objection to the Memorandum and Recommendation by the Chief Magistrate Judge, a Motion to Amend his Complaint, and Response to Defendants' Hipps' and Hyatt's Motion to Dismiss.

McMahan filed a response opposing the Plaintiff's motion to amend his complaint, and filed a Judgment on the Pleadings on November 27, 1995. Defendants Hipps and

Hyatt filed a Memorandum of Additional Authorities on February 2, 1996.

The U.S. District Court, Western District of North Carolina, Asheville Division, granted the Respondents' motions on March 1, 1996. On March 11, 1996, the Court issued its judgment dismissing Hall's claims against Hipps and Hyatt, based on the Memorandum and Recommendation by Chief United States Magistrate Judge J. Toliver Davis.

Hall filed an appeal in the Fourth Circuit Court of Appeals on June 13, 1996. The Respondents filed a reply brief on October 7, 1996. Oral argument was heard on June 2, 1997. The Court of Appeals issued a per curiam decision on July 25, 1997, in which it said in a footnote, "Hall argues that the district court misunderstood his claim as alleging defamation; instead, he asserts an invasion of his 'right to be free of prosecutorial actions in which he is repeatedly named and cited but not prosecuted, when that prosecutorial action is injurious to the Plaintiff's name, reputation and livelihood.... This court has never recognized such a right and we decline to do so here.'" Hall then filed this petition for Writ of Certiorari without seeking a rehearing.

Statement of the Facts

The Petitioner was employed as the Officer in Charge of the Smoky Mountain United Narcotics Investigative Team (hereinafter, "SMUNIT"), a multijurisdictional task force located in Sylva, Jackson County, North Carolina.[1] SMUNIT was formed to investigate crimes involving drugs. The Petitioner was thus employed from June 8, 1989 to July

[1] Unless otherwise indicated, all of the information in this section is from the Plaintiff's Complaint filed July 18, 1995 in the United States District Court, Western District of North Carolina, Asheville Division, Case No. 1:45cv154D, and reproduced in the Appendix for the United States Court of Appeals for the Fourth Circuit, Record No. 96-1899.

24, 1992. He was appointed to his post by election of the SMUNIT Board of Directors. The Petitioner was on loan to SMUNIT from the Jackson County Sheriff's Department, where he was a deputy sheriff.

At all times relevant to the Petitioner's allegations, McMahan was serving as Chief of Police for the Town of Sylva, North Carolina and was a member of the SMUNIT Board of Directors until July 23, 1992.[2] The Town of Sylva was a participating member of SMUNIT. Chief of Police McMahan served as chairman of the SMUNIT Board of Directors from June 15, 1992 to July 22, 1992, at which time he resigned during a meeting of the Board. On July 22, the Board rejected all proposals for an inventory of SMUNIT. On July 23, 1992, McMahan wrote to District Attorney Hipps, informing him that the Town of Sylva was withdrawing from SMUNIT. McMahan then requested that Hipps conduct a thorough audit of SMUNIT assets, equipment, and evidence. At this point, McMahan was no longer on the Board, nor was his Town a participating member in SMUNIT.

At all times relevant to the Petitioner's allegations, Hipps was serving as the District Attorney for North Carolina Prosecutorial District 30, a seven-county area which includes Jackson County and the Town of Sylva.

On July 24, 1992, McMahan provided a verification under oath for a motion by Hipps to be presented to the North Carolina Superior Court judge for District 30B, the Honorable J. Marlene Hyatt, seeking authorization for Hipps to seize and investigate SMUNIT. (App.-43) In this motion, and the ensuing Order, Hall was alleged and held to have violated state law and to have committed other acts of

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[2] All heads of participating law enforcement entities were automatically appointed to the Board. District Attorney Hipps was also automatically made a member.

wrongdoing in his daily management of SMUNIT. Hipps also falsely stated that the Board had voted at a meeting on July 22, 1992, for a thorough audit of SMUNIT to be conducted by the District Attorney. McMahan, who was present at the July 22 meeting, stated in his Answer that he had no knowledge of the day-to-day operation of SMUNIT, and that he had only rare occasion to visit SMUNIT headquarters. His sworn verification of the veracity of Hipps' allegations was not truthful.

Hipps provided the Petitioner with no notice of his intent to present his motion to the court, and never notified him of any hearing. Hipps requested and received an ex parte hearing from Judge Hyatt. Hyatt apparently did not require that the Petitioner be present before she found as a matter of law that he had violated state law and engaged in other wrongdoing. This was done prior to any investigation by Hipps. The court's order, prepared by Hipps prior to the hearing, allowed him to seize SMUNIT and shut down its investigations in order to conduct an audit. Hipps spoke that day with members of the media regarding his petition and the reasons he had given in it for seizure of SMUNIT, including his allegations about the Petitioner. The shutdown of SMUNIT was covered by local and regional television and radio stations, and newspapers.

On that same day, Hipps had SMUNIT headquarters padlocked by the Sylva Police Department, thus aborting all ongoing investigations. Thorough audits of evidence, funds, equipment, and other assets were conducted by Hipps' office over the next 14 months.

The Petitioner was stigmatized by the allegations and the state court's findings of fact and law. Due to his new-found notoriety, Hall was taunted by criminal defendants with whom he came in contact during the course of his work as a law enforcement officer. However, he was never charged with any crime. He had all of the stigma and none of the procedural safeguards due a criminal defendant. He

was never notified of the initial or subsequent hearings involving his conduct at SMUNIT. Hipps' Final Report, dated September 22, 1993, cited the Petitioner by name 10 times, and the final Order of September 24, 1993 cited the Petitioner 41 times. The Order stated 29 times that the Petitioner had committed wrongdoing as a matter of fact, and 11 times that he had committed wrongdoing as a matter of law. Hipps invited at least 48 people, many of them members of government and the media, to the final hearing, but he did not notify the Petitioner.

The Petitioner, overcome with depression and problems related to a former gunshot wound, retired on disability in December, 1992. He continues to be treated for reactive depression arising out of Respondents Hipps', Hyatt's, and McMahan's actions on July 24, 1992 and subsequent actions.

The Petitioner asserts that his Fourteenth Amendment rights to due process were violated by the Respondents in that he was cited as a criminal without being afforded notice, a hearing, or any other procedural safeguard afforded a citizen who expects to be free of arbitrary and capricious actions by government officials.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fourth Circuit declined to recognize, as a matter of first impression, the Petitioner's claims under the due process clause of the Fourteenth Amendment. Under Rule 1(c) of the Rules of the Supreme Court of the United States, a grant of certiorari may be entertained when a U.S. Court of Appeals decides an important question of federal law or, as in this case, has

decided a federal question by declining to do so.[3] The Court has delineated the violations of due process that might be brought about by a district attorney, and has noted the problem posed when a district attorney acts outside the scope of his immunity but who then does not charge the suspect with any crime.[4] "[T]hough several checks other than civil litigation prevent prosecutorial abuses in advising the police, 'one of the most important checks, the judicial process,' will not be effective in all cases, especially when in the end the suspect is not prosecuted.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 271; 125 L.Ed.2d 209; 113 S.Ct. 2606, 2614 (1993), citing *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991). In both *Buckley* and *Burns*, the plaintiffs were eventually charged, and had the benefit of formal prosecution, and therefore were protected by the Constitutional and procedural guarantees of due process afforded an accused.[5] Here, the District Attorney, Respondent Hipps, involved the North Carolina State Bureau of Investigation, the North Carolina Governor's Commission on Crime Control, and the Federal Bureau of Investigation in his 14-month long search for evidence to support his decision to shut down SMUNIT. Hipps never brought any

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[3] The United States District Court, Western District of North Carolina, Asheville Division, in deciding the defendant's motions to dismiss, treated the Petitioner's claims as mere injuries to reputation, and did not address the Petitioner's larger due process concerns. (App. at)

[4] For example, the Court has decided that a prosecutor may be only qualifiedly immune for comments made to the press (*Buckley v. Fitzsimmons*, 509 U.S. 259; 125 L.Ed.2d 209; 113 S.Ct. 2606 (1993)); for advice made to the police (*Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991)), or for investigative work (*Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976)).

[5] Although they had to resort to civil rights litigation to prove an overstepping of the absolute immunity granted prosecutors.

charges, nor did he find reason to. The Petitioner suffered a total loss of credibility, effectiveness, and job-worthiness as a result of the District Attorney's actions.

Under the common law, and in numerous federal cases, the Congress and the courts have provided protection under the Fourteenth Amendment for citizens who have been harmed by over-zealous prosecutors.[6] Clearly, citizens are protected from prosecutorial abuses, and have civil rights protecting them from arbitrary and capricious acts of persons in state or federal government.

The net result is anomolous; persons who are eventually charged are afforded procedural safeguards firmly established in criminal procedure, whereas persons who are never charged are left without redress in the criminal arena, and can only hope for redress in the realm of civil rights litigation. The Petitioner has brought this 42 U.S.C. Section 1983 action in the hope that a federal court will examine the district attorney's actions in this case to determine if his failure to name the Petitioner as a defendant or to charge him formally during a 14-month long investigation violated the Petitioner's rights to due process under the Fourteenth Amendment.

The District Court abused its discretion in failing to consider these interpretations of the facts, characterizing the Petitioner's injury as one to his reputation, and thus analyzed the facts in a manner neither consistent with the allegations nor in a light most favorable to the Plaintiff. *Jordan v. Bowman Apple Products, Inc.* 728 F.Supp. 409, 411 (W.D.Va. 1990); *Morris Electronics of Syracuse, Inc. v. Mattel, Inc.*, 595 F.Supp. 56 (N.D.N.Y. 1984).

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[6] See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259; 125 L.Ed.2d 209; 113 S.Ct. 2606 (1993); *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976).

I. A prosecutor is not absolutely immune for his actions when he conducts a 14-month long investigation under the guise of a formal criminal proceeding wherein he fails to name an accused, but cites an individual for having violated state law in an ex parte and subsequent proceedings.

The test for absolute immunity "focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley v. Fitzsimmons*, 509 U.S. 259, 271; 125 L.Ed.2d 209; 113 S.Ct. 2606, 2615, (1993), citing *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). The Petitioner contends that Respondent Hipps, under the guise of a criminal prosecution in which no one was prosecuted, was merely seizing SMUNIT, and using alleged conduct by the Petitioner as his rationale for doing so. Defendant Hipps was a member of the SMUNIT Board of Directors, and he could have acted through the SMUNIT Board to bring about an audit. Instead, he named the Petitioner in an ex parte motion, cited instances of lawbreaking and misconduct, but never formally charged him of any crime. Hipps' conduct was thus one of an investigator prior to a formal charge, or as an administrator who seized control of an arm of law enforcement for the purpose of conducting an audit, and thus he is not entitled to absolute immunity. *Mendenhall v. Goldsmith*, 59 F.3d 685 (7th Cir. 1995).

Prosecutors are absolutely immune for conduct in "initiating a prosecution and in presenting the state's case when that conduct is intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* 424 U.S. 409, 430, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). Many of the acts alleged by Hipps do not fit within *Imbler's* function test. Prosecutors bear the burden of showing that any actions

complained of merit absolute as opposed to qualified immunity. *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991). There is a presumption that qualified immunity is sufficient for the actions taken by government officials. Id. at 558-559; *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982). The burden of proof is on the government official to show that acts taken by him are to be afforded absolute immunity. Id.

Imbler's function test is to be read narrowly and requires an objective view of the purpose of the official's action. *Hill v. City of New York*, 45 F.3d 653, 662-663 (2d Cir. 1995). In the present case, Petitioner Hall alleges that District Attorney Hipps filed an ex parte motion without probable cause in order to begin conducting an investigation. Hipps' motion solely served an investigatory function, as opposed to being part of the "judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). As such, his actions should not be afforded the protection of absolute immunity. "Investigative work may not be transformed into advocacy simply by being characterized as work in preparation for trial; otherwise, absolute immunity against a suit brought by an innocent citizen for a constitutional wrong would always protect a district attorney who simply forces such a case to trial." *Buckley v. Fitzsimmons*, 509 U.S. 259, 276; 125 L.Ed.2d 209; 113 S.Ct. 2606, 2617 (1993).

Hipps opened a Superior Court criminal case without any criminal charges having been brought and without a named defendant for the sole purpose of conducting a criminal investigation. His motion and the subsequent order enabled him to seize control of SMUNIT's assets and records, to shut down SMUNIT operations, and to publicize his actions. The case file number in Hipps' action was 92

CRS 1395[7]. In North Carolina's General Court of Justice, this indicates a criminal case (in most cases a felony) being brought in the Superior Court. Although Hipps' actions in 92 CRS 1395 were largely administrative, he chose to designate the case as criminal. He named the Petitioner four times in his initial motion, and six times in the ensuing Order, but afforded the Petitioner no notice, no hearing, and no post-deprivation remedies. Hipps also did not ascertain whether McMahan had personal knowledge of the allegations in his motion.[8] Petitioner Hall further argues that Hipps conspired with McMahan to procure a verification for his July 24, 1992 motion, and conspired with Hyatt regarding the time and place of the ex parte hearing. These actions are not absolutely immune. Furthermore, prosecutors are not absolutely immune for advising the police. *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934; see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L.Ed.2d 209 at 225, 113 S.Ct. 2606 (1993). Hipps coordinated with the State Bureau of Investigation and the Sylva Police Department in seizing SMUNIT and questioning its personnel. Hipps' actions in coordinating an investigation prior to criminal charges being brought are actions which precede the judicial phase of the prosecution and thus are not absolutely immune.

Hipps has altogether failed to demonstrate that any of his actions are entitled to absolute immunity. An official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.

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[7] North Carolina Court of General Justice, Superior Court Division, Jackson County, North Carolina.

[8] McMahan provided verification of Hipps' allegations, and swore under oath that the allegations were true and correct based on personal knowledge. (App. at A-) McMahan admitted in his Answer that he had limited knowledge of the Plaintiff's management of SMUNIT. (A-35)

Forrester v. White, 484 U.S. 219, 224, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988).

The Court has consistently pointed out one shortcoming of the *Imbler v. Pachtman* function test, noting that, although "several checks other than civil litigation prevent prosecutorial abuses in advising the police, 'one of the most important checks, the judicial process,' will not be effective in all cases, especially when in the end the suspect is not prosecuted." *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (quoting *Imbler v. Pachtman* at 430.)

The burden is on the innocent petitioner/accused to demonstrate that the denial of his Constitutional rights stemmed from actions that were not absolutely immune, and only in this way can he begin to vindicate his rights. *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L.Ed.2d 209 at 225, 113 S.Ct. 2606 (1993).

Hipps' actions have gone unchecked by the "procedural safeguard" afforded by actual prosecution and the judicial process. Thus, the Imbler function test does not apply to or protect those who are never prosecuted, nor does it apply to those who are targeted by a judicial action which is investigatory in nature and which never results in any prosecution.

II. An individual's liberty interests under the due process clause of the Fourteenth Amendment are violated when he is repeatedly cited for having violated the law, without notice or a hearing, when said citations thwart his ability to work effectively in his job position and profession and curtail the likelihood of finding similar work in his profession.

The Fourteenth Amendment prohibits state deprivations of life, liberty, or property without due process of law. Whether a deprivation of due process has occurred

requires a multi-step analysis. First, was the Plaintiff deprived of an interest in life, liberty, or property? Second, if so, what kind of process, in the form of notice and a hearing, was due the plaintiff? See, e.g., *Robb v. City of Philadelphia* 733 F.2d 286, 292 (3d Circ. 1984); United States Constitution, Fourteenth Amendment, U.S.C.A.

The Petitioner asserts he was deprived of his Fourteenth Amendment liberty interests when Hipps and Hyatt, together and individually, made allegations and findings that the Petitioner had violated North Carolina state law and engaged in wrongdoing without having probable cause or competent evidence to support their claims. Similarly, Hipps and McMahan violated the Petitioner's rights when Hipps sought McMahan's sworn verification that the allegations in Hipps' July 24, 1992 motion were true to the best of McMahan's knowledge and belief, where Hipps apparently made no effort to ascertain the extent of McMahan's knowledge. "[W]here the State attaches a 'badge of infamy' to the citizen, due process comes into play." *Wisconsin v. Constantineau* 400 U.S. 433, 437; 27 L.Ed.2d 515, 91 S.Ct. 507 (1971). "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 437. As in the above case, the Petitioner, was given no opportunity, in the form of notice or a hearing, to defend himself. Petitioner did not become aware of Hipps' and Hyatt's actions until he arrived at SMUNIT headquarters to find it padlocked and saw a copy of Hyatt's Order on the door.

The basic elements of due process, notice and a hearing, are essential to prevent an ordinary citizen such as the Petitioner from becoming a "victim of an official's caprice." Id. At the time McMahan verified Hipps' motion, and Hipps and Hyatt held their ex parte hearing, the Petitioner was a deputy sheriff, and the injury to his good name and professional reputation that resulted from the

Respondent's actions caused damage to his credibility as a law enforcement officer and as a citizen. To be accused of and found, as a matter of law, to have violated state law when one is in law enforcement is squarely within the realm of the "unsavory label" which the Court envisioned when it held that such a label, when put in place by government without notice and without a hearing, was a violation of the Petitioner's liberty interests under the Fourteenth Amendment. *Wisconsin v. Constantineau* at 437.

The actions of the Respondents additionally violated the Petitioner's liberty interests when they caused Hall to be deprived of his position as Agent in Charge of SMUNIT, which was shut down as a result of the July 24, 1992 motion and order. Hall was given no notice and no hearing regarding his position as Agent in Charge, and his opportunity to function in that role ceased without warning when he arrived at work to find SMUNIT headquarters padlocked by the District Attorney's office and Hyatt's order. Since Defendants Hipps and Hyatt based their actions in large part upon the alleged and unsubstantiated wrongdoing of the Petitioner, and their actions resulted in his loss of position, reputation and salary, the deprivation suffered by the Petitioner is a violation of due process. *Robb v. City of Philadelphia*, 733 F.2d 286, 294 (3rd Cir. 1984). Any employment action which results in a stigma against an employee's reputation, when accompanied by a loss of salary or a transfer to lesser position, or a stigma which curtails the employee's ability to seek similar work elsewhere is a violation of that employee's liberty interests under the due process clause of the Fourteenth Amendment. Id. See also *Siegert v. Gilley*, 500 U.S. 226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991). Petitioner suffered a loss of his honor, credibility, and perceived integrity both professionally and personally, a loss of his position as Agent in Charge of SMUNIT which, in part, was a management role, and a loss of his $100.00 per week salary as Agent in Charge. He was

not given an opportunity to clear his name, and asserts he was the "victim of an official's caprice." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971). "Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." Id.

The Petitioner asserts that his future employment prospects were made nonexistent as a result of McMahan's, Hipps' and Hyatt's acts. "Although (*Paul v. Davis*) rejected a private employee's claim, it expressly reaffirmed *Roth*, *McElroy*, and other decisions recognizing that stigmatization deprives a person of liberty when it causes loss of present or future government employment." *Siegert v. Gilley*, 500 U.S. 226, 240; 114 L.Ed.2d 277, 293; 111 S.Ct. 1789, 1797; citing *Paul v. Davis*, 424 U.S. 693, 702-710, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); see also *Doe v. United States Department of Justice*, 753 F.2d 1092 (1985); *Robb v. City of Philadelphia*, 733 F.2d 286, 294 (1984). The Petitioner, who was employed in a government position, and who retired on disability in large part because of his major depression stemming from the Respondents' acts, was not and is not employable as a law enforcement officer, let alone as a narcotics agent, due to the stigmatization caused by the Respondents' assertions, allegations, and findings that he had violated the law and mishandled evidence and funds.

The Petitioner asserts that he stated a cognizable deprivation of a liberty interest and has fairly stated a claim upon which relief may be granted, and therefore the Respondents' Motions to Dismiss and for Judgment on the Pleadings should have been denied by the U.S. District Court. In addition, the U.S. Court of Appeals should have viewed the Petitioner's plight as one which merits a recognition of his loss of liberty interests. The Petitioner was stigmatized by actions taken by state officials with the aid of a local official, and was never given the opportunity for timely notice or a hearing. Hall suffered, in addition to

his loss of reputation, the loss of his credibility and effectiveness as a law enforcement officer, the loss of his position and salary, and his ability to find future employment as a law enforcement officer. [9] Hall had been voted to be Agent in Charge by the SMUNIT Board of Directors, and expected to so serve unless removed for cause or due to resignation and reassignment.[10] He was instead left with a history of a psychiatric disorder mixed with allegations of mishandling and commingling of evidence and money, obviously making the Petitioner unemployable in his field. His resignation, though voluntary, was in large part motivated by the overwhelming depression he suffered after he was publicly disgraced.

III. The Petitioner suffered a loss of a property interest under the Fourteenth Amendment of the U.S. Constitution when he was publically censured and held to have violated state law in an ex parte hearing when he was denied all opportunity for timely notice and a hearing regarding said allegations.

The Respondents caused the Petitioner to be deprived of a title, position, and salary in a government-funded multijurisdictional task force that was governed by a Board of Directors. Hipps was a member of the Board of Directors by virtue of his position as District Attorney of District 30. Although the Petitioner did not have tenure or a written

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[9] In addition, the seizure of SMUNIT resulted in the loss of approximately 100 to 120 narcotics cases that had been developed by the SMUNIT agents.

[10] In July, 1992, the Plaintiff was suffering from Graves's Disease. He asked to be reassigned at the July 22, 1992 Board meeting due to his thyroid condition. The Board took no action on his request. (A-159,160)

contract securing his position as Agent in Charge, his position "was secured by a no less binding understanding" based on the Board of Directors' election of the Petitioner to his position. *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 599, 92 S.Ct. 2694 (1972). Furthermore, the SMUNIT Policy and Procedure Manual, Chapter III outlines SMUNIT's Code of Conduct, including the procedures for handling infractions and violations of the code. The Petitioner was never criticized, censured, or penalized by the Board or any of its individual members for any misbehavior while he was in office. The Policy and Procedure Manual acted as a de facto contract in which Petitioner understood that he would not be removed from his position without cause for misbehavior, or unless a majority of the members of the Board voted to replace him. He had "no less a 'property' interest in continued employment than a formally tenured teacher,... and had no less a procedural due process right to a statement of reasons and a hearing"[11] before the Board or any of its members sought to end his employment. Id. at 601. "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Id. In addition, SMUNIT's annual grant had just been approved, ensuring that SMUNIT would be funded for the next year. As in *Perry v. Sindermann*, the Petitioner has alleged the existence of rules and understandings, promulgated and fostered by state and county officials, that "justify his legitimate claim of entitlement to continued employment absent sufficient cause." Id. at 602. As a member of the SMUNIT Board of Directors, Hipps was aware of SMUNIT's policies and procedures, and was on notice of Petitioner's on-the-job performance. Hipps stood in

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[11] Or at least an election.

the role of supervisor to Hall by virtue of being a member of the Board of Directors. He chose to accuse Hall of criminal acts via a motion to seize SMUNIT rather than to adhere to the SMUNIT procedures for questioning the conformance with existing law of Hall's acts. Hipps knew the procedures for handling misconduct, had the power to have Hall's job performance questioned and scrutinized, and had the continuous right to inspect SMUNIT headquarters, as provided for in the SMUNIT Policy and Procedure Manual's chapter, "Code of Conduct." Instead, Hipps accomplished these same tasks by obtaining an ex parte order based on an unverified motion.

IV. The Petitioner, having shown a deprivation of liberty and/or property interests, was denied his rights to procedural due process under the Fourteenth Amendment.

Had the Petitioner been permitted to amend his Complaint, he could have shown that he received $100 per week for his services[12]. He has also shown that he was in an elected position. The SMUNIT Charter contained a Code of Conduct which could be viewed as giving the Petitioner reason to think he would not be let go without cause, and at the least it would have taken a vote of the Board of Directors. During the July 22, 1992 meeting in which he asked to be reassigned[13], the Board took no action to reassign him, and the Petitioner continued to serve as Agent-in-Charge, and was acting in that position when Hipps had McMahan verify

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12 The U.S. District Court denied the Plaintiff's Motion to Amend his Complaint, even though several of the facts asserted were matters which the defendants had constructive knowledge by virtue of their seats on the SMUNIT Board of Directors.

13 Due to Graves Disease, a condition of the thyroid.

his motion and presented the motion in an ex parte hearing with Superior Court Judge Hyatt.

The Petitioner has sufficiently stated claims to both liberty and property interests. He need only plead a claim, and not the facts to prove the claim. *Jordan v. Bowman Apple Products*, 728 F.Supp. 409, 411 (W.D.Va. 1990); see also *U.S. v. Marisol, Inc.*, 725 F.Supp. 833 (M.D. Pa. 1989); *Spell v. McDaniel*, 591 F.Supp. 1090, 1099 (E.D.N.C. 1984). This Court has stated that the test is prospective, and that the issue is what the plaintiff can show, not what has been shown. *Conley v. Gibson*, 355 U.S. 41. 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The contents and outcome of Hipps' July 24, 1992 motion were widely disseminated to local and regional television stations, radio stations, and newspapers by Hipps. Garnering such publicity is not a function traditionally attributed to the role of prosecutor, and thus Hipps would not be absolutely immune for such actions. *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L.Ed.2d 209, 113 S.Ct. 2606 (1993); see also *Barbera v. Smith*, 826 F.2d 96 (2nd Cir. 1987).

The Petitioner's work site was seized and padlocked. He was taunted by criminal defendants. Given his line of work and the facts in this case, the actions taken by Respondents McMahan, Hipps, and Hyatt created "such a stigma or badge of disgrace" that a due process violation can be assumed, and the defendants' actions therefore required some form of notice and an opportunity to be heard. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971).

Due process is not limited to actions taken by employers. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. In *Wisconsin v. Constantineau*, the court speculated that the Petitioner "may have been the victim of

an official's caprice," adding, "[o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." Id. The Petitioner was never given notice or a hearing, despite the fact that Hipps invited up to 48 people and numerous media people to his final hearing.[14] The Petitioner asserts that he should be free of capricious actions by local government officials taken under the guise of public office which victimize and stigmatize one's reputation and livelihood.

Petitioner Hall has, as of the date of this petition for Writ of Certiori, never been charged with any crime, has never been reprimanded by his superior officer for his actions in SMUNIT, and never received any sanctions for his alleged misconduct.

CONCLUSION

Based on the foregoing reasons, the petition for a writ of certiorari should be granted.

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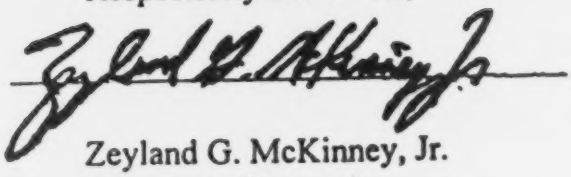
[14] This activity is also not traditionally one of a prosecutor, and Defendant Hipps should not be afforded absolute immunity as a defense. It should be noted that all hearings in 92 CRS 1395 were held ex parte.

Respectfully submitted,



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(2)

No. 97 728 OCT 22 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1997

DAVID EUGENE HALL,

Petitioner,

v.

CHARLES HIPPS,
Jackson County District Attorney,
in his Individual and Official Capacity;
HAROLD MCMAHAN,
Town of Sylva Chief of Police,
in his Individual and Official Capacity;
MARLENE HYATT,
Thirtieth Judicial District Superior Court Judge,
in her Individual and Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Petition for Writ of Certiorari

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID EUGENE HALL,

Plaintiff-Appellant,

v.

CHARLES HIPPS,
Jackson County District Attorney
in his Individual and Official Capacity;
HAROLD MCMAHAN,
Town of Sylva Chief of Police,
in his Individual and Official Capacity;
MARLENE HYATT,
Thirtieth Judicial District Superior
Court Judge, in Her Official Capacity,

Defendants-Appellees,

and

JACKSON COUNTY, NORTH CAROLINA,

Defendant.

No. 96-1899

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville.
Lacy H. Thornburg, District Judge; J. Toliver Davis,
Magistrate Judge.
(CA-95-154-D)

Argued: June 2, 1997
Decided: July 25, 1997
Entered: July 25, 1997

Before WILKINSON, Chief Judge, and WILKINS and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Pamela Anne White, Sylva, North Carolina, for Appellant. David Roy Blackwell, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees Hipps and Hyatt; Ellen M. Gregg, WOMBLE, CARLYLE, SANDRIDGE & RICE, Winston-Salem, North Carolina, for Appellee McMahan. **ON BRIEF:** Zeyland G. McKinney, Jr., Robbinsville, North Carolina, for Appellant. Michael F. Easley, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; James P. Erwin, Jr., Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Asheville, North Carolina, for Appellees Hipps and Hyatt.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Until December 1992, David Hall was employed as a deputy sheriff in Jackson County, North Carolina. From June 1989 to July 1992, Deputy Hall was detailed to a multi-county

drug task force, the Smoky Mountain United Narcotics Investigative Team (SMUNIT), as the Officer in Charge.

In July 1992, a SMUNIT Board member, Harold McMahan, proposed an audit of SMUNIT's assets and inventory. Charles Hipps, the local District Attorney, made an *ex parte* motion in the local Superior Court to authorize Hipps to take possession of all SMUNIT property and conduct the audit. On July 24, 1992, Superior Court Judge Marlene Hyatt issued the requested order. As SMUNIT had been effectively disbanded, Hall returned to his position at the Jackson County Sheriff's Department, where he remained until retiring for disability reasons several months later. The SMUNIT investigation continued for approximately one year. At its conclusion, Hipps issued a report that was very critical of Hall's management of SMUNIT. Judge Hyatt then issued an order, making similar findings. However, no criminal charges were ever filed against Hall.

In July 1995, Hall initiated this action under 42 U.S.C. § 1983 against McMahan, Hipps, and Hyatt. Hipps and Hyatt moved to dismiss; McMahan answered and then moved for judgment on the pleadings. In March 1996, the district court granted all three defendants' motions, but dismissed Hall's state law claims without prejudice, enabling him to refile them in state court.

We agree with the district court that injury to reputation alone is not deprivation of a liberty or property interest protected by the Fourteenth Amendment. *See Paul v. Davis*, 424 U.S. 693 (1976). Since Hall did not allege deprivation of any other protected interest,* he failed to state a

---

* Hall argues that the district court misunderstood his claim as alleging defamation; instead, he asserts an invasion of his"right to be free of prosecutorial actions . . . in which he is repeatedly named and cited but not prosecuted, when that prosecutorial action is injurious to the Plaintiff's name, reputation and livelihood." Brief of Appellant at 18. This court has never recognized such a right and we decline to do so here.

claim under § 1983 against any of the defendants. Accordingly, having carefully considered the briefs and arguments of counsel, we affirm on this reasoning of the district court. *See Hall v. Hipps*, No. 1:95cv154 (W.D.N.C. March 1, 1996); *Hall v. McMahan*, No. 1:95cv154 (W.D.N.C. March 1, 1996).

AFFIRMED

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

DAVID EUGENE HALL,

Plaintiff,

v.

JACKSON COUNTY DISTRICT ATTORNEY CHARLES HIPPS,
in his official capacity;
JACKSON COUNTY DISTRICT ATTORNEY CHARLES HIPPS,
in his individual capacity;
TOWN OF SYLVA CHIEF OF POLICE HAROLD MCMAHAN,
in his official capacity;
TOWN OF SYLVA CHIEF OF POLICE HAROLD MCMAHAN,
in his individual capacity;
THIRTIETH JUDICIAL DISTRICT SUPERIOR COURT JUDGE MARLENE HYATT,
in her official capacity;
THIRTIETH JUDICIAL DISTRICT SUPERIOR COURT JUDGE MARLENE HYATT,
in her individual capacity;
and JACKSON COUNTY, NORTH CAROLINA,

Defendants,

Civil No. 1:95CV154

Entered: March 1, 1996

MEMORANDUM AND ORDER

THIS MATTER is before the Court on the Plaintiff's timely filed objections to the Memorandum and Recommendation of Chief United States Magistrate Judge J. Toliver Davis filed November 1, 1995. Pursuant to 28 U.S.C. § 636 and standing orders of designation, this Court referred the Motion to Dismiss of Defendants Hipps and Hyatt to the Magistrate Judge for a recommendation as to disposition. For the reasons stated below, the recommended relief is granted.

In addition, the Court has before it the Plaintiff's Motion for Leave to File a Response Outside of Time, filed November 13, 1995; and the Plaintiff's Motion for Leave to Amend his Complaint, filed November 13, 1995.

I. STANDARD OF REVIEW

This Court reviews *de novo* those portions of the Memorandum and Recommendation to which objections have been filed 28 U.S.C. § 636(b). The Plaintiffs have objected to the recommendations that:

(1) the Plaintiff's claims against defendants Hipps and Hyatt be summarily dismissed in that the Plaintiff failed to file a timely response to the Defendants' motion to dismiss;

(2) the Plaintiff's claims for damages against Defendant Hyatt be dismissed in their entirety on the basis of her judicial immunity;

(3) the Plaintiff's claims for damages against Defendant Hipps be dismissed

in their entirety on the basis of his absolute prosecutorial immunity;

(4) the Plaintiff's Section 1983 claims for damages against the Defendants in their official capacities be dismissed on the basis of the Eleventh Amendment;

(5) the Plaintiff's supplemental state law claims against the Defendants in their official capacities be dismissed on the basis of the Eleventh Amendment;

(6) the Plaintiff's Section 1983 due process claims be dismissed in their entirety in that the Plaintiff has failed to allege the deprivation of constitutional interest;

(7) the Plaintiff's Section 1983 conspiracy claims against the Defendant be dismissed on the basis of the intracorporate-immunity doctrine or the insufficiency of the Plaintiff's allegations; and

(8) the Plaintiff's remaining supplemental state law claims be dismissed.

No objections were filed by the Defendants. This Court also reviews *de novo* all motions filed subsequent to the filing of the Memorandum and Recommendation.

II. PROCEDURAL AND FACTUAL BACKGROUND

The Plaintiff was the Officer in Charge of the now disbanded Smoky Mountain United Narcotics Investigative

Team ("SMUNIT"), an organization created by numerous North Carolina cities and counties (including Jackson County, North Carolina), from June 8, 1989, until July 24, 1992. The Plaintiff was a salaried employee of the Jackson County Sheriff's Department who was loaned to SMUNIT to serve as its Officer in Charge, and he received an additional $100 per week above his regular salary for serving in this position. The Plaintiff was a Jackson County deputy sheriff from 1981 until December 11, 1992, we he retired.

At all times relevant to the Plaintiff's allegations, Defendant Hipps was the District Attorney of Jackson County, North Carolina, and he also served on the Board of Directors of SMUNIT. Defendant Hyatt was a Superior Court Judge for North Carolina Superior Court District 30B, comprised of Haywood and Jackson Counties. N.C. Gen Stat. § 7A-41.

The Plaintiff's central contention is that Defendants Hipps and Hyatt deprived him of his constitutional rights in violation of Title 42, United States Code, Section 1983. This alleged deprivation stemmed primarily from the July 24, 1992, issuance of *ex parte* order by Defendant Hyatt, upon motion of Defendant Hipps, transferring control over SMUNIT to Defendant Hipps, citing for cause the Plaintiff's purported misconduct. The Plaintiff contends that he suffered damage to his reputation and emotional distress as a result of this order, but that he received no notice or hearing regarding the substance of the order prior to its issuance. The Plaintiff also contends that he was injured by the manner in which Defendant Hipps conducted his investigation of SMUNIT and disclosed information to the press, by Defendant Hyatt's courtroom procedures, by a September 22, 1993, report to the court presented by Defendant Hipps, by a subsequent final order issued by Judge Hyatt on September 24, 1993, and by an alleged ban placed on North Carolina State Highway Patrol personnel that prevented them from frequenting the Plaintiff's business premises while on duty of in a state-owned vehicle.

In a complaint filed July 18, 1995, the Plaintiff asserted claims against Defendants Hipps and Hyatt in both their individual and official capacities pursuant to 42 U.S.C. § 1983 for the alleged deprivation of his Fourteenth Amendment due process rights, as well as supplemental state law claims for the intentional infliction of emotional distress and for the negligent infliction of emotional distress. In addition, the Plaintiff asserted a state law claim against Defendant Hipps for tortious interference with a contract. The Plaintiff sought only damages pursuant to these claims, and did not see injunctive relief.

Defendants Hipps and Hyatt filed a motion to dismiss the Plaintiff's complaint on September 28, 1995. The Plaintiff's response to the Defendants' motion was due to be filed no later than October 23, 1995, but no response was filed prior to this date. Magistrate Judge Davis filed his Memorandum and Recommendation on November 1, 1995, in which he recommended that the Defendants' motion to dismiss be summarily granted because of the Plaintiff's failure to file a timely response, or in the alternative, that the motion to dismiss be granted based upon a substantive review of the pleadings.

The Plaintiff timely filed his objections to the Magistrate Judge's recommendations on November 13, 1995. On the same date, the Plaintiff filed a Motion for Leave to File a Response Outside of Time, a Response to Defendants Hipps' and Hyatt's Motion to Dismiss, and a Motion for Leave to Amend his Complaint.

In his request amendments to his complaint, the Defendant seeks *inter alia*, to add requests for certain injunctive relief, and to allege that he received an additional $100.00 per week as Agent in Charge of SMUNIT above his regular salary as a deputy sheriff of Jackson County.

III. DISCUSSION

A. Post-Recommendation Motions

As for Plaintiff's Motion for Leave to File a Response Outside of Time, the Court finds that the plaintiff's proffered reasons for his delay--counsel's illness and failure to understand the Court's Civil Justice Expense and Delay Reduction Plan-- do not constitute "excusable neglect," and therefore the motion shall be denied.

As for the Plaintiff's Motion for Leave to Amend his Complaint, the Court notes that the motion was not timely filed under the Federal Rules of Civil Procedure and that no good cause has been shown or suggested as to why justice requires the Court to grant leave to amend in this instance. Fed. R. Civ. P. 15(a). The motion shall, therefore, be denied.

B. Judicial Process Immunity

A judge is absolutely immune form a claim for damages arising out of his or her judicial actions. *Chu v. Griffith*, 771 F.2d 79, 81 (4th Cir. 1985). In order to determine whether a judge is immune from suit, it is necessary to determine whether she had jurisdiction over the subject matter when she took the action at issue. *Stump v. Sparkman*, 435 U.S. 349, 356 (1978). Only in the "clear absence of all jurisdiction" will a judge be deprived of immunity; therefore, a judge is not deprived of immunity even when her actions are in error, are done maliciously, or are in excess of her authority. *Id*, at 356-57. The Court agrees with the Magistrate Judge that the Plaintiff's claims against Judge Hyatt arise out of her judicial actions, and that there was not a "clear absence of all jurisdiction" under the alleged facts of this case. See *Forrester v. White*, 484 U.S. 219, 227 (1988). Therefore, all claims against Judge Hyatt, in both her official and individual capacities, shall be dismissed.

The traditional common-law protections extended to the judicial process have also been applied to officials who perform prosecutorial functions. *Id.*, at 225-26 (citing *Imbler v. Pacluman*, 424 U.S. 409, 430 (1976)). In determining whether a prosecutor's actions are entitled to absolute immunity, courts consider whether the challenged actions of the prosecutor are closely associated with the judicial process, keeping in mind that "the same considerations of public policy that underlie the common law rule [of absolute immunity] likewise countenance absolute immunity under § 1983." *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2613-14 (1993) (citations omitted). This, prosecutors enjoy absolute immunity for actions intimately associated with the judicial process. It is also observed that "'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of the prosecution and actions apart from the courtroom,' and are nonetheless entitled to absolute immunity." *Id.* at ___ U.S. ___, 113 S. Ct. at 2615. That is the case here. Therefore, the Court follows the Magistrate Judge's recommendation the Defendant Hipps is entitled to absolute prosecutorial immunity in this action, and grants Defendant Hipps' motion to dismiss Plaintiff's action in its entirety as it relates to that Defendant.

C. Eleventh Amendment Bar

The Plaintiff has not objected in substance to the Magistrate Judge's recommendation that his claims against the Defendants in their official capacities are barred by the Eleventh Amendment; rather, he contends that the Defendants have performed acts outside the scope of their official duties. He also points out the Eleventh Amendment permits prospective, injunctive relief against state officials sued in their official capacities, as well as suits against state officials sued in their individual capacities, thereby apparently accepting the recommendations that these Defendants are in

fact state official entitled to Eleventh Amendment immunity. Therefore, the Court accepts the recommendations that the Plaintiff's claims against both Defendants in their official capacities are barred by the Eleventh Amendment, and these claims are likewise dismissed on this basis.

D. Section 1983 Due Process Claims

Having addressed the immunities afforded to each of the Defendants, the Court will proceed to the substance of the Plaintiff's claims. The Plaintiff alleges that his due process rights were violated when the Defendants took actions affecting him without providing him with notice or an opportunity to be heard. As a result of these actions, the Plaintiff suffered damage to his reputation and emotional distress.

The Court first finds that the Defendants' alleged actions do not rise to the level of a substantive due process violation. *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir.), *cert. denied*, ___ U.S. ___, S. Ct. 64 (1995). The Court must therefore determine whether the Plaintiff has alleged a claim for the deprivation of procedural due process.

In order to state such a claim, the Plaintiff must allege that the Defendants deprived him of an interest in life, liberty, or property. However, injury to reputation by itself is not a "liberty" or "property" interest protected under the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693 (1976); *see also Wildauer v. Frederick Co.*, 993 F.2d 369, 373 (4th Cir. 1993) ("Section 1983 cannot be used as a vehicle for asserting a claim of deprivation.") Instead, a plaintiff must allege a cognizable stigma and the ensuing loss of a tangible interest. *Hodge v. Jones*, 31 F.3d 157, 165 (4th Cir.) *cert. denied*, ___ U.S. ___, 115 S. Ct. 581 (1994); *see also San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 701 (5th Cir. 1991) (Section 1983 plaintiff must show a stigma plus an infringement of some other interest) (emphasis in original). To satisfy the

infringement portion of this requirement, a plaintiff must establish that the state sought to remove or significantly alter a life, liberty, or property interest recognized and protected by state law or guaranteed by one of the provisions of the Bill of Rights that has been "incorporated." *San Jacinto Sav. & Loan*, 928 F.2d at 701-02 (citing Paul, 424 U.S. at 710 n.5)

The Court finds that the Plaintiff has not alleged that he was deprived of a recognized "liberty" interest by the Defendants. *See Stone v. Univ. of Md. Medical Sys.*, 855 F.2d 167, 172 n.5 (4th Cir. 1988). As to whether the Plaintiff has allegedly been deprived of a recognized "property" interest, the Court notes that the Plaintiff was a Jackson County deputy sheriff on loan to SMUNIT before the Defendants' alleged actions, and that he remained a Jackson County deputy sheriff after the dissolution of SMUNIT. The Plaintiff also alleges that he received an additional $100 per week as the Officer in Charge of SMUNIT, which he no longer received as a result of the Defendants' alleged actions. However, the Plaintiff has not alleged that he had a continued entitlement to these additional monies, or to his position as Officer in Charge of SMUNIT. Moreover, it would appear that the loss of this additional income stems from the dissolution of SMUNIT, and not from actions directed at the Plaintiff. Finally, the Plaintiff has not otherwise alleged the loss of protected interest. In short, the Plaintiff has not alleged the removal or significant alteration of a live, liberty, or property interest recognized and protected by state law or guaranteed by an "incorporated" provision of the Bill of Rights. Therefore, the Plaintiff's Section 1983 claims against both defendant Hipps and Defendant Hyatt shall be dismissed in their entirely.

The Plaintiff also alleges that Defendants Hipps and Hyatt conspired to violate his constitutional rights in violation of Section 1983. However, because the Plaintiff has failed to allege any deprivation of protected constitutional interest, he has failed to allege a conspiracy to violate a protected constitutional interest, and his conspiracy claim shall be

dismissed. *See Sattler v. Johnson*, 857 F.2d 224, 226-27 (4th Cir. 1988) (must allege the violation of a constitutional right to state a cognizable conspiracy claim under Section 1983). In the alternative, the Court agrees with the Magistrate Judge that the Plaintiff's conspiracy claims are not otherwise supported by allegations tending to show the existence of any conspiracy, and should not be dismissed on this basis as well.

E. Supplemental State Law Claims

Because the Court has dismissed all claims over which it has original jurisdiction, it declines to exercise supplemental jurisdiction over the Plaintiff's remaining state law claims. 28 U.S.C. § 1367(e)(3).

IV. ORDER

IT IS, THEREFORE, ORDERED that the motion of Defendants Hipps and Hyatt to dismiss the Plaintiff's Section 1983 claims is summarily **GRANTED** in its entirety based on Plaintiff's failure to file a memorandum of law in response, as required by Civil Justice Expense and Delay Reduction Act Plan; or, alternatively, the motion is **GRANTED** in its entirety based on a review of the substance of the pleadings before the Court; and

IT IS FURTHER ORDERED that the Plaintiff's Motion for Leave to File a Response Outside of Time is **DENIED**; and the Plaintiff's Motion for Leave to Amend his Complaint is **DENIED**.

THIS the 1st day of March 1996.

/s/_____
LACY H. THORNBURG
UNITED STATES
DISTRICT COURT JUDGE

United States District Court
for the
Western District of North Carolina
March 1, 1996

** MAILING CERTIFICATE OF CLERK **

Re: 1:95-cv-00154

True and correct copies of the attached were mailed by the clerk to the following:

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cc:
Judge
Magistrate Judge

Frank G. Johns, Clerk
By: /s/_____
Deputy Clerk

Date: 3/1/96

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

DAVID EUGENE HALL,

Plaintiff,

v.

TOWN OF SYLVA CHIEF OF POLICE HAROLD MCMAHAN, in his official capacity; TOWN OF SYLVA CHIEF OF POLICE HAROLD MCMAHAN, in his individual capacity; and JACKSON COUNTY, NORTH CAROLINA,

Defendants,

Civil No. 1:95CV154

Entered: March 1, 1996

MEMORANDUM AND ORDER

THIS MATTER is before the Court on Defendant McMahan's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, filed November 27, 1995. Defendant McMahan contends that the Plaintiff's Complaint fails to state a claim for relief as a matter of law. For the reasons stated below, Defendant McMahan's motion shall be granted.

I. STANDARD OF REVIEW

A plaintiff's complaint should be dismissed for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. See *Hishon v. King & Spalding*, 467 U.S. 69, 71 (1984). In making this determination, all allegations must be construed in the light most favorable to the plaintiff.

II. PROCEDURAL AND FACTUAL BACKGROUND

The Plaintiff was the Officer in Charge of the now disbanded Smoky Mountain United Narcotics Investigative Team ("SMUNIT"), an organization created by numerous North Carolina cities and counties (including Sylva, North Carolina), from June 8, 1989, until July 24, 1992. The Plaintiff was a salaried employee of the Jackson County Sheriff's Department who was loaned to SMUNIT to serve as its Officer in Charge, and he received an additional $100 per week above his regular salary for serving in this position. The Plaintiff was a Jackson County deputy sheriff from 1981 until December 11, 1992, when he retired.

At all times relevant to the Plaintiff's allegations, Defendants McMahan was apparently the Chief of Police for the town of Sylva, North Carolina, and he served as the Chairman of the Board of Directors for SMUNIT form June 15, 1992, until approximately July 22, 1992, at which time he resigned from the Board of Directors and allegedly notified others that Sylva was withdrawing from SMUNIT.

The Plaintiff's central contention is that Jackson County District Attorney Charles Hipps and Thirtieth Judicial District Superior Court Judge Marlene Hyatt, former Defendants to this lawsuit dismissed by prior Court Order, deprived him of his constitutional rights when Judge Hyatt issued and *ex parte* order, upon Hipps' motion, transferring control over SMUNIT to Hipps, citing for cause the Plaintiff's

purported misconduct. The Plaintiff contends that Defendant McMahan, by supporting and participating in Hipps' alleged actions, violated his due process rights by damaging his reputation and causing him severe emotional distress, and intentionally and negligently inflicted severe emotional distress upon the Plaintiff.

III. DISCUSSION

A. Section 1983 Due Process Claims

As an initial matter, the Court finds that the Defendant's alleged actions are not "so arbitrary or irrational, so unjustified by any circumstance of governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies," and thus do not rise to the level of a substantive due process violation. *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir.) *cert. denied*, ___ U.S. ___, 116 S. Ct. 64 (1995). Therefore, the Court will focus upon whether the Plaintiff's allegations state a claim for the deprivation of procedural due process.

In order to state such a claim, a plaintiff must allege the deprivation of a protected interest. However, injury to reputation by itself is not a "liberty" or "property" interest protected under the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693 (1976); *see also Wildauer v. Frederick Co.*, 993 F.2d 369, 373 (4th Cir. 1993) (Section 1983 cannot be used as a vehicle for asserting a claim of defamation."). Instead, a plaintiff must allege a cognizable stigma and the ensuing loss of a tangible interest. *Hodge v. Jones*, 31 F.3d 157, 165 (4th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 581 (1994); *see also San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 701 (5th Cir. 1991) (Section 1983 plaintiff must show a stigma plus an infringement of some other interest) (emphasis in original). To satisfy the infringement portion of this requirement, a plaintiff

must establish that the state sought to remove or significantly alter a life, liberty, or property interest recognized and protected by state law or guaranteed by one of the provisions of the Bill of Rights that has been "incorporated." *San Jacinto Sav. & Loan*, 928 F.2d at 701-02 (citing *Paul*, 424 U.S. at 710 n.5).

The Court finds that the Plaintiff has not alleged that he was deprived of a recognized "liberty" interest by Defendant McMahan. *See Stone v. Univ. of Md. Medical Sys.*, 855 F.2d 167, 172 n.5 (4th Cir. 1988). As to whether the Plaintiff has allegedly been deprived of a recognized "property" interest, the Court notes that the Plaintiff was a Jackson County deputy sheriff on loan to SMUNIT before the Defendant's alleged actions, and that he remained a Jackson County deputy sheriff after the dissolution of SMUNIT. The Plaintiff also alleges that received an additional $100 per week as the Officer in Charge of SMUNIT, which he no longer received as a result of the Defendant's alleged actions. However, the Plaintiff has not alleged that he had a continued entitlement to these additional monies, or to his position as Officer in Charge of SMUNIT. Moreover, it would appear that the loss of this additional income stems from the dissolution of SMUNIT, and not from actions directed at the Plaintiff. Finally, the Plaintiff has not otherwise alleged the loss of protected interest. Because the Plaintiff has not alleged the removal or significant alteration of a life, liberty, or property interest recognized and protected by state law or guaranteed by an "incorporated" provision of the Bill of Rights, in his Section 1983 claim against Defendant McMahan shall be dismissed in its entirety.

The Plaintiff also appears to allege that Defendant McMahan conspired with Hipps and Judge Hyatt to violate his constitutional rights in violation of Section 1983. However, because the Plaintiff has failed to allege any deprivation of protected constitutional interest, he has failed to allege a conspiracy to violate a protected constitutional interest, and his

conspiracy claim against Defendant McMahan shall also be dismissed in its entirety. *See Sattler v. Johnson*, 857 F.2d 224, 226-27 (4th Cir. 1988) (must allege the violation of constitutional right to state cognizable conspiracy claim under Section 1983). Furthermore, the Plaintiff has not otherwise supported his conspiracy claim with allegations tending to show the existence of any conspiracy, and the Plaintiff's claim should be dismissed on this basis as well.

B. Supplemental State Law Claims

The Plaintiff also alleges that Defendant McMahan intentionally or negligently inflicted severe emotional distress upon him. However, because the Court has dismissed all claims over which it has original jurisdiction, it declines to exercise supplemental jurisdiction over the Plaintiff's state law claims. 28 U.S. C. § 1367(c)(3).

IV. ORDER

IT IS, THEREFORE, ORDERED that the Plaintiff's Section 1983 claims shall be **DISMISSED** in their entirety with prejudice as to Defendant McMahan in his official and individual capacities, and judgment is entered for Defendant McMahan on these claims; and

IT IS FURTHER ORDERED that the Plaintiff supplemental state law claims shall be DISMISSED in their entirety without prejudice, and judgment is entered for Defendant McMahan on these claims.

This 1st day of March, 1996.

/s/_____
LACY H. THORNBURG
UNITED STATES
DISTRICT COURT JUDGE

United States District Court
for the
Western District of North Carolina
March 1, 1995

** MAILING CERTIFICATE OF CLERK **

Re: 1:95-cv-00154

True and correct copies of the attached were mailed by the clerk to the following:

Pamela A. White, Esq.
P.O. Box 724
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Zeyland G. McKinney Jr., Esq.
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Ellen M. Gregg, Esq.
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Winston-Salem, NC 27102

cc:
Judge
Magistrate Judge

Frank G. Johns, Clerk
By: /s/_____
Deputy Clerk

Date: 3/1/96

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

DAVID EUGENE HALL,

Plaintiff,

v.

JACKSON COUNTY DISTRICT ATTORNEY CHARLES HIPPS,
in his official capacity;
JACKSON COUNTY DISTRICT ATTORNEY CHARLES HIPPS,
in his individual capacity;
TOWN OF SYLVA CHIEF OF POLICE HAROLD MCMAHAN,
in his official capacity;
TOWN OF SYLVA CHIEF OF POLICE HAROLD MCMAHAN,
in his individual capacity;
THIRTIETH JUDICIAL DISTRICT SUPERIOR COURT JUDGE MARLENE HYATT,
in her official capacity;
THIRTIETH JUDICIAL DISTRICT SUPERIOR COURT JUDGE MARLENE HYATT,
in her individual capacity;
and JACKSON COUNTY, NORTH CAROLINA,

Defendants,

Civil No. 1:95cv154-D

Entered: November 1, 1995

MEMORANDUM AND RECOMMENDATION

PURSUANT TO 28, UNITED STATES CODE, SECTION 636(b) and the standing orders of designation entered by the district court, the undersigned magistrate judge has reviewed defendants Hipps's and Hyatt's Motion to Dismiss. Those defendants filed their motion September 28, 1995, and, in accordance with the Civil Justice Expense and Delay Reduction Act Plan, plaintiff's memorandum of law in response was due to be filed no later than October 23, 1995. *See* CJEDRA plan § Three (II)(B). Plaintiff failed to file any response and is represented by a member of the Bar of this court. It appearing that such defendants' motion is uncontested, the undersigned is compelled to recommend to the district court that the complaint be summarily dismissed in its entirety as to defendants Hipps and Hyatt.

I. Background

Independent of such procedural default, it appears that the moving defendants are substantively entitled to the relief they seek. Plaintiff--former officer in charge of the now disbanded Smoky Mountain United Narcotics Investigative Team ("SMUNIT")--primarily contends in his 25-page complaint that District Attorney Charles Hipps and Honorable Marlene Hyatt, North Carolina Superior Court Judge, deprived him of his constitutional right to due process in violation of 42, United States Code, Section 1983. Plaintiff's central contention is that Judge Hyatt issued and *ex parte* order, upon motion of Hipps, transferring control of SMUNIT from plaintiff to Hipps, citing for cause Plaintiff's purported criminal misconduct. Plaintiff fails to allege that he was deprived of any recognized interest in life, liberty, or property by such acts; rather, he contends that such defendants' acts injured his professional reputation and resulted in seizure of assets and records of SMUNIT.

Plaintiff also takes issue with the manner in which Defendant Hipps handled the investigation and disclosed information to the press and questions whether Defendant Hyatt followed proper procedures in her court. In addition to the Section 1983 claims, plaintiff also asserts a laundry list of supplemental common-law claims against Defendants Hipps and Hyatt. In response to plaintiff's complaint, defendants Hipps and Hyatt have asserted a number of immunity-base defenses.

II. Eleventh-Amendment Immunity

Sued in their official capacities as state officials, Defendants Hipps and Hyatt both enjoy eleventh-amendment immunity from suit. In pertinent part, the eleventh amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

As to Section 1983 liability of the state in the federal courts, the Supreme Court noted in *Quern v. Jordan*, 440 U.S. 332, 345 (1979):

> [Section] 1983 does not explicitly and by clear language indicated on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

By suing state officials in their official capacities, plaintiff has sued the State of North Carolina, which enjoys eleventh-amendment protections. *Brandon v. Holt*, 469 U.S. 464, 471 (1985); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). *See also Edelman v. Jordan*, 415 U.S. 651 (1974). The Supreme Court made clear in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 2307-08 (1989), that the states and their officials sued in their official capacities are immune from suit under 42, United States Code, Section 1983 because they are not "persons" within the meaning of that statute.

Absent waiver of consent, neither of which appears here, the eleventh amendment bars suit directly against the state, regardless of the relief sought. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). *See also Will v. Department of State Police, supra.* The bar of eleventh-amendment immunity is effective whether the state is named party or, as here, a party in fact. *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974). Insofar as plaintiff has attempted to sue Defendants Hipps and Hyatt in their official capacities, the eleventh amendment stands as an absolute bar to this action. The undersigned must, therefore, respectfully recommend that the claims asserted against Defendants Hipps and Hyatt in their official capacities be dismissed.

III. Absolute Immunity

A. Immunity of Judges

Judges, such as Defendant Hyatt, are immune from liability for judicial acts unless done in clear absence of all jurisdiction. *Stump v. Sparkman*, 435 U.S. 349 (1978); *see Pierson v. Ray*, 386 U.S. 547 (1967). Immunity is not lost because an action is taken in error, done maliciously, or even exceeds the judge's authority. *Stump v. Sparkman, supra*, at 356; *Chu v. Griffith*, 771 F.2d 79 (4th Cir. 1985). As to Defendant Hyatt, the allegations of the complaint reveal on

their face that the act complained of by plaintiff was judicial, inasmuch as the function complained of was one exclusively performed by a judge acting in her judicial capacity. *Forrester v. White*, 484 U.S. 219 (1988). Plaintiff's allegation that Defendant Hyatt lacked jurisdiction to sign an order in Jackson County affecting the interests in Haywood County is clearly contrary to the holding of *Baker v. Varser*, 239 N.C. 180 (1954), which provides that a superior court judge has general jurisdiction anywhere in the district to consider and decide "in-chambers" matters. Defendant Hyatt enjoys absolute immunity from suit in this court.

B. Immunity of Prosecutors

Defendant Hipps is entitled to summary dismissal based on prosecutorial immunity. A state prosecutor is a quasi-judicial officer who enjoys absolute immunity from suit when performing prosecutorial, as opposed to investigative or administrative, functions. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Absolute immunity is designed to protect the judicial process. *Id.* In determining whether such immunity is available, courts consider whether the challenged actions of the prosecutor are closely associated with the judicial process. *Burns v. Reed*, ___ U.S. ___, 59 U.S.L.W. 4536 (1991). Inasmuch as all acts by Defendant Hipps in the challenged action were, as plaintiff alleges in his complaint, closely associated with the judicial process, the undersigned finds that Defendant Hipps is entitled to absolute prosecutorial immunity, that his motion should be granted, and this action should be dismissed as to him.

IV. Conspiracy

In paragraphs 37, 50, 51, and 55 of the complaint, it appears that the plaintiff has attempted to allege a civil conspiracy between Defendants Hipps and Hyatt to violate his

constitutional right to due process. Judicial immunity does not protect one who conspires with a judge to violate civil rights. *Dennis v. Sparks*, 449 U.S. 24 (1980). In this case, however, plaintiff has attempted to allege a conspiracy between to state actors, and impossibility under the intracorporate-conspiracy doctrine.

Even if the intracorporate-conspiracy doctrine did not bar this claim, the Court of Appeals for the Eleventh Circuit held in *Phillips v. Mashburn*, 746 F.2d 782, 785 (11th Cir. 1984), that "being on the winning side of a lawsuit does not make a [person] a co-conspirator or a joint actor with the judge who presided over the case." *Id.* In addition, this action is not unlike *Crabtree v. Muchmore*, 904 F. 2d 1475, 1990 U.S. App. LEXIS 8898 (10th Cir. 1990), wherein the Court of Appeals for the Tenth Circuit held:

> The plaintiffs' allegations of conspiratorial conduct fall into four categories, ex parte communications, adverse rulings, adoption of proposed orders, findings and conclusions and direction of activities. In taking as true those facts pled to support these allegations and in drawing all reasonable inferences therefrom as required under Rule 12(b)(6), the Court finds that there are no facts in the instant complaint which tend to show that these alleged conspirators had an understanding or agreed plan with Judge Cook to cause harm or injury to the plaintiffs.
>
> The Court is mindful that direct evidence of a conspiracy is rarely available and that the existence of conspiracy must usually be inferred from the circumstances. The Court is equally "mindful that caution is advised in any pre-trial disposition of conspiracy

> allegations in civil rights actions." Clulow, 700 F.2d at 1303 (citing Fisher v. Shamburg, 624 F.2d 156, 162 (10th Cir. 1980)).
>
> However, the rule is clear that allegations of conspiracy must provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action. A conspiracy cannot be found from allegations of judicial error, ex parte communications (the manner of occurrence and the substance of which were not alleged) or adverse rulings absent specific facts demonstrating an agreement to commit the alleged improper actions.

Id. 1900 U.S. App. LEXIS 8898, 17-18. As in *Crabtree*, plaintiff alleges in this matter judicial error, *ex parte* communications, and adoption by state judicial officers of a proposed order adverse to plaintiff. The undersigned has carefully reviewed the complaint. As the court in *Crabtree*, the undersigned is mindful that direct evidence of conspiracy is rare and that conspiracy must usually be inferred from the circumstances. Consequently, all factual contentions and inferences have been viewed in a light most favorable to plaintiff. Even when read in such a light, the allegations contained in the complaint are insufficient to "support the existence of the elements of a conspiracy: agreement and concerted action." *Id.*

At most, plaintiff has alleged that judicial officials erred in applying North Carolina law and violated the rules of conduct for judicial officials by engaging in *ex parte* communications with litigants. For obvious reasons, such alleged conduct is simply not actionable in this court. Inasmuch as plaintiff's claims of civil conspiracy are barred by the intracorporate-immunity doctrine and are not otherwise

supported by allegations tending to show the existence of any conspiracy, the undersigned must recommend the plaintiff's claim based on conspiracy be dismissed as to Defendants Hipps and Hyatt.

V. Case and Controversy

The jurisdiction of this court pivots on whether the plaintiff has a live case and controversy. Plaintiff claims that this court's jurisdiction rests on 28, United States Code, Section 1331, which gives this court jurisdiction over federal questions. The purported federal question here is whether Defendants Hipps and Hyatt deprived plaintiff of due process under the United States Constitution. In order to assert such claim properly, plaintiff must allege and be prepared to prove that these two defendants deprived him of an interest in life, liberty, or property. Plaintiff's only claim is that such defendants' acts injured his reputation and deprived him of control of SMUNIT. Although plaintiff contends that Defendant Hyatt concluded in her order that he had violated state law while running SMUNIT, plaintiff has made no allegation that the acts of Defendants Hipps and Hyatt resulted in his termination, demotion, or reduction of benefits, much less the deprivation of any liberty interest through incarceration. Indeed, it appears undisputed that before and after issuance of the Order at issue that plaintiff was a Jackson county deputy sheriff and remained in such position until he took disability retirement. Clearly, plaintiff does not have a claim against these defendants for violation of substantive due process.

Finally, plaintiff has not made allegations sufficient to support a claim that these defendants deprived him of a liberty interest based on procedural due process. Plaintiff's only claimed injury, taken as true for purposes of the pending motion, is that the acts of these two defendants injured his reputation. A governmental *employer* impairs a person's

liberty interest in pursuing his occupation where there is a public charge vitiating his reputation for honesty or morality. *See Board of Regents v. Roth*, 408 U.S. 564, 571 (1972); *Bishop v. Wood*, 426 U.S. 341, 349 (1976). There is no allegation that either Defendant Hipps or Defendant Hyatt was plaintiff's employer; rather, it appears undisputed that plaintiff was at all relevant times the employee of the Sheriff of Jackson County. Under the *Bishop* and *Roth* standard, however, mere *allegations* which caused professional humiliation and loss of professional opportunities are not sufficient to state a claim for deprivation of liberty interest entitling the plaintiff to procedural due process. In *Thomas v. Smith*, 897 F.2d 154 (5th Cir. 1989), the Court of Appeals for the Fifth Circuit held as follows:

> [In order to] establish deprivation of a liberty interest [plaintiff] must show, among other things, that [s]he was stigmatized in connection with denial of a right or status recognized by state law. [Citations omitted.] Typically, reassignment alone is insufficient to trigger such a liberty interest.
>
> > "When an employee retains his position... the only claim of stigma he has derives from the injury to his reputation, an interest that *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976)] reveals does not rise to the level of a liberty interest. The internal transfer of an employee... does not provide the additional loss of a tangible interest necessary to give rise to a liberty interest under the due process clause of the Fourteenth Amendment'"

Id, at 156, quoting *Moore v. Otero*, 557 F.2d 435, 438 (5th Cir. 1977). In short, plaintiff's allegations do not state a claim for deprivation of life, liberty, or property, and his claims of injury to his reputation do not provide him with standing to assert constitutional claims against nonemployers. The undersigned, therefore, is compelled to recommend that these defendants' Motion to Dismiss plaintiff's due-process claims under the fourteenth amendment of the United States Constitution be granted.

VI. Supplemental Claims

In addition to the claims asserted under 42, United States Code, Section 1983, plaintiff has also asserted common-law claims against these state defendants. As discussed at length above, suit against state officials for acts done in their official capacities is a suit against the state. Although plaintiff has also attempted to sue such defendants in their individual capacities, there are no substantive allegations, only conjecture, that these defendants acted in other than their official capacities.

The eleventh amendment bars suits against states in federal courts. Based on that bar, the undersigned must recommend that plaintiff's supplemental common-law claims be dismissed.

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that defendants Hipp's and Hyatt's Motion to Dismiss be

(a) summarily **GRANTED** in its entirety based on plaintiff's failure to file a memorandum of law in response, as required by the Civil Justice Expense

and Delay Reduction Act Plan; or, alternatively,

(b) be **GRANTED** in its entirety based on review of the substance of the pleadings before the court.

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(1)(C), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within ten (10) days of service of the same. Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986); *United States v. Schronce*, 727 F.2d 91 (4th Cir.), *cert. denied*, 467 U.S. 1208 (1984).

This Memorandum and Recommendation is entered in response to defendants Hipp's and Hyatt's Motion to Dismiss (#16).

This 1st day of November, 1995.

/s/_____
J. TOLIVER DAVIS
UNITED STATES
MAGISTRATE JUDGE

United States District Court
for the
Western District of North Carolina
November 2, 1995

** MAILING CERTIFICATE OF CLERK **

Re: 1:95-cv-00154

True and correct copies of the attached were mailed by the clerk to the following:

Pamela A. White, Esq.
P.O. Box 724
Sylva, NC 28779

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Ellen M. Gregg, Esq.
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cc:
Magistrate Judge

Frank G. Johns, Clerk
By: /s/_____
Deputy Clerk

Date: 11/2/95

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

DAVID EUGENE HALL,

Plaintiff,

v.

JACKSON COUNTY DISTRICT ATTORNEY CHARLES HIPPS, in his official capacity, et al.,

Defendants,

Civil No. 1:95cv154

Entered: March 11, 1996

JUDGMENT

DECISION BY COURT. This action came before the Court on Plaintiff's timely filed objections to the Memorandum and Recommendation of Chief United States Magistrate Judge J. Toliver Davis, filed November 1, 1995, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered as to Defendant Hipps and Hyatt in accordance with the Court's Order filed March 1, 1996.

FRANK G. JOHNS, CLERK
By: /s/_____
Deputy Clerk

March 11, 1996

United States District Court
for the
Western District of North Carolina
March 11, 1996

** MAILING CERTIFICATE OF CLERK **

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Frank G. Johns, Clerk
By: /s/_____
Deputy Clerk

Date: 3/11/96

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
ASHEVILLE DIVISION

DAVID EUGENE HALL,

Plaintiff,

v.

JACKSON COUNTY DISTRICT ATTORNEY CHARLES HIPPS, in his official capacity, et al.,

Defendants,

Civil No. 1:95cv154

Entered: March 1, 1996

JUDGMENT

DECISION BY COURT. This action came before the Court on Defendant McMahan's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rule of Civil Procedure, filed November 27, 1995, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered as to Defendant McMahan in his official and individual capacities, in accordance with the Court's Order filed March 1, 1996.

FRANK G. JOHNS, CLERK
By: /s/_____
Deputy Clerk

March 1, 1996

United States District Court
for the
Western District of North Carolina
March 1, 1996

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cc:
Judge
Magistrate Judge

Frank G. Johns, Clerk
By: /s/_____
Deputy Clerk

Date: 3/1/96

STATE OF NORTH CAROLINA
COUNTY OF JACKSON

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 92 CRS 1395

In Re:

(1) All articles of property which have been seized or confiscated by Smoky Mountain United Narcotics Investigation Team;

(2) All articles of property which have come into the possession of Smoky Mountain United Narcotics Investigation Team;

(3) Smoky Mountain United Narcotics Investigation Team.

Entered: July 24, 1992

PETITION

COMES NOW Charles W. Hipps, District Attorney for the Thirtieth Prosecutorial District, and petitions this court as follows:

1. Charles W. Hipps is the elected District Attorney for the Thirtieth Prosecutorial District.

2. Smoky Mountain United Narcotics Investigation Team ("Unit") is an organization existing pursuant to a "constitution" and "bylaws" and presently

comprised of the Western Carolina University Security Department, Jackson County Sheriff's Department, Cherokee Police Department, Swain County Sheriff's Deportment, Macon County Sheriff's Department and Highland Police Department. David Hall ("Hall") is the "Agent in Charge" of the Unit and as such is in charge of the operation of the Unit in all of its day to day activities.

3. Petitioner is charged by the Constitution and the General Statutes of the State of North Carolina with the following duties:

A. Oversight of all property seized by any law enforcement officer pursuant to lawful authority to determine if such property is useful or necessary as evidence in a criminal trial [G.S. 15-11.1(a).]; and,

B. Advising law enforcement officers in the Thirtieth Prosecutorial District [Article IV, Section 18, N.C. Constitution; G. S. 7A-61].

4. The Superior Court is charged by the Constitution and the General Statutes of the State of North Carolina with the following duties:

A. Oversight of all property seized by any law enforcement officer pursuant to lawful authority to determine if such

property is useful or necessary as evidence in a criminal trial [G.S. 15-11.1(a).];

B. Entry of such orders as are necessary to assure that evidence will be available for use at the time of trial [G.S. 15-11.1(a).];

C. Entry of such orders related to the disposition and security of evidence as will protect the rights of the State and defendants [G.S. 15-11.1(a).]; and,

D. Entry of such orders as will assure that any property, the forfeiture and disposition of which is specified in any general or special law, shall be disposed of in accordance therewith [G.S. 15-11.1(c).].

5. The Unit has within its possession the following:

A. Articles of property seized pursuant to consensual searches (G.S. 15A-221 *et seq.*);

B. Articles of property seized pursuant to search warrants (G.S. 15A-241 *et seq.*);

C. Articles of property seized pursuant to arrests;

D. Articles of property seized pursuant to forfeiture statutes.

6. On information and belief, Hall as "Agent in Charge" of the Unit has done the following:

A. Failed to maintain a register of property confiscated, seized, found or otherwise within its lawful possession as required by G.S. 15-11;

B. Failed to safely keep property seized in its lawful authority as required by G.S. 15-11.1(a);

C. Failed to complete forfeiture procedures as required by statute.

7. The Unit has maintained files and records in its various cases which are the only means available for the District Attorney and this Court to determine questions of ownership and disposition of property held by the Unit.

8. On information and belief, Hall as "Agent in Charge" of the Unit has intermingled property lawfully seized and/or held by the Unit pursuant to lawful authority with the Unit's other assets to such extent that it is presently impossible to determine the ownership, whereabouts and/or actual disposition of evidence and/or other lawfully seized and/or held property.

9. The board of directors of the Unit voted on July 22, 1992 to suspend operations of the Unit pending a full accounting of the Unit's operations, assets, funds and property.

10. The board of directors of the Unit has requested the District Attorney to do the following:

A. To conduct a full inventory of all assets, evidence and property held by the Unit;

B. Reconcile such inventory cases; and

C. Assist in the lawful disposition of the Unit's assets.

(See Exhibit A, attached hereto and made a part hereof).

11. The Chief of the Town of Sylva Police Department, formerly a member of said board of directors, in his capacity as former member of the board of directors has requested the District Attorney to inventory of all assets of and evidence held by the Unit in order to determine the proper disposition thereof. (See Exhibit B, attached hereto and made a part hereof)

12. Authority exists under the above named statutory and constitutional provisions as well as under the inherent authority of the Superior Court and G.S. 15-

217.1 for this petition and any other orders issued hereunder.

WHEREFORE, petitioner request and order as follows:

A. Requiring the Unit, its officers, agents, employees, servants or other persons in any way acting in or on behalf of the Unit to immediately upon the execution of this order do the following:

1. Cease any and all access to the physical premises of the Unit at Sylva Plaza, Sylva, North Carolina except as may be directed by the District Attorney or his office;

2. Turn over to the District Attorney all files, records and property of the Unit;

3. Cease any and all access to and/or use of the Unit's files, records and property.

B. Directing the District Attorney to do the following:

1. Take possession of the physical premises of the Unit at Sylva Plaza, Sylva, North Carolina;

2. Take possession of all files, records and property of the Unit;

3. Secure the physical premises of the Unit;

4. Secure all files, records and property of the Unit in a location of the District Attorney's choosing;

5. Conduct an inventory and audit of all files, records, property and assets of the Unit;

6. Determine the whereabouts and/or disposition of all files, records property and assets of the Unit;

7. Render periodic reports to the Superior Court of his actions or findings;

8. Render a final report to the Superior Court of his actions and/or findings.

C. Directing the Sheriff of Jackson County to serve and make return thereof, within two (2) hours of the time of execution of the order, a copy of the petition and order in this matter in the following manner:

1. Upon David Hall and David Farmer, the two remaining employees of the Unit;

2. Upon each member of the board of directors, specifically, the agency heads of the Western Carolina University Security Department, Jackson County Sheriff's Department, Cherokee Police Department, Swain County Sheriff's Department, Macon County Sheriff's Department, Highland Police Department.

D. Directing the District Attorney to post a copy of the order and petition in this matter at the entrances to the physical premises of the Unit.

This the 24th day of July, 1992.

/s/_____
Charles W. Hipps
District Attorney

VERIFICATION

I, Harold McMahan, am the Police Chief of Sylva, North Carolina, and after being sworn state that I have read the petition herein and state that the facts stated therein are to the best of my knowledge true and correct, except as to those allegations set forth upon information and belief, and as to those allegations, he believes them to be true.

This 24th day of July, 1992.

/s/_____
Harold McMahan

Haywood County
North Carolina

SWORN AND SUBSCRIBED before me the 24th day of July, 1992.

/s/_____
Notary Public

My Commission Expires 4-20-95